IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 21

RAY BROOKS,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S BRIEF IN REPLY TO BRIEF OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICI CURIAE*

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REASON FOR FILING THIS REPLY BRIEF

This brief is filed, pursuant to leave granted at the time of the oral argument, to reply to the brief filed on October 12th by the above-named unions as *amici curiae*. Accordingly this reply brief will be confined to their contention that the winning of a Board-conducted election by a union prevents the employees from revoking at any time the authority of the union to represent them until such authority is revoked in another election conducted by the Board.

ARGUMENT

POINT I.

The provisions of the amended Act do not make an election the sole means by which employees may rid themselves of an unwanted, certified bargaining agent.

Two of the chief purposes of the 1947 amendments to the National Labor Relations Act were to give more freedom to employees and to curtail certain powers which had been abused by some labor organizations and their officers.[1] Despite this obvious and well-known fact, the brief of the *amici curiae* seeks to construe the provisions of the amended Act to accomplish the exact opposite.

The gist of the argument of the *amici* is that because the Congress provided in § 9(c) one method by which employees might rid themselves of an unwanted bargaining agent, this method therefore became the only method for accomplishing that object. This argument, however, ignores the simple fact that Congress did not so state, either expressly or impliedly. If Congress had wished an election to be the sole method whereby employees could withdraw the authority of a certified bargaining agent, Congress would have said so. It is significant that in those instances where Congress desired certain results to flow from the certification of a bargaining representative, Congress so specified.[2]

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[1]See, *e.g.*, §§ 1, 7, 8(b), and 9(c)(1)(A)(ii) of the amended Act (61 Stat. 136).

[2]Thus, § 8(b)(4)(C) of the Act makes it an unfair labor practice for a labor organization or its agents to engage in a strike where an object thereof is forcing an employer to bargain with a particular labor organization as the representative of his employees "if another labor organization has been certified as the representative of such employees under the provisions of section 9"; and § 8(b)(4)(B) renders it an unfair labor practice for a labor organization to encourage

Further, the express language of § 9(c) shows that the Congress intended a result contrary to that urged by the *amici*. Thus the *amici* admit that, where a bargaining agent has been designated by informal means—such as by membership cards, or by a petition, or after an election supervised by some third party—the agent's authority may be revoked at will by the employees without an election at any time prior to consummation of a collective bargaining contract.[3] However, § 9(c)(1)(A)(ii) of the Act specifically authorizes an election among the employees for the purpose of revoking the authority of an uncertified agent who "is being currently recognized by their employer." Hence the *amici* are in the position of arguing that the same statutory text provides an exclusive method for revoking the authority of a certified bargaining representative and a non-exclusive method for revoking the authority of an uncertified bargaining representative. We find it impossible to follow the logic of this type of argument.[4]

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the employees of any employer to strike for the object of requiring "any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9." See also § 8(d).

[3]See pp. 21-22 of their brief where they point with approval to the same admission made by the Board on p. 23, fn. 12, of its brief.

[4]The *amici* on p. 7 of their brief say that the changes made in Board election procedure by the 1947 amendments to the Act support their argument. But the Act, as amended, makes the same changes in the election procedure under which a union seeks certification. Therefore, if we are to give credence to the *amici* argument, it would follow that a bargaining agent could be designated only by means of a Board election. But § 9(c) itself recognizes that a bargaining agent may be designated by other means. The Board also recognizes various means of selecting bargaining agents. In a recent report to Congress the Board said that the Act "does not require that the representative be selected by any particular procedure, as long as the representative is clearly the choice of a majority of the employees." *Eighteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1953*, p. 10.

It is worthy of note that § 9(c)(1) of the Act provides that the election machinery of the Board shall be utilized "*Whenever* a petition shall have been filed . . ." [Italics ours.] The use of the word "whenever" clearly shows that the filing of a petition is permissive and not mandatory. The term "whenever", used as a conjunction, commonly expresses condition or contingency, and means "if" or "in case" or "where".[5] The obvious implication of the text is that circumstances may exist to render such filing for an election unnecessary. The Act does not say that, unless a petition seeking termination of an agency is filed, a certification must continue indefinitely.[6] And the Act does not say that one year or any particular time must elapse before it is possible to revoke an agent's authority.

In various places in the Act, where Congress intended to express exclusiveness, it did so; it is therefore reasonable to conclude that, if Congress had intended to make a "de-

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[5]*People* v. *Merhige*, 212 Mich. 601, 610, where the statute read: "That whenever any person shall plead guilty . . . it shall be the duty of the judge . . ." See also *Crawford* v. *Weidemeyer*, 93 Ohio St. 461, 465, where the constitutional clause read: "Whenever the judges of a court of appeals find that a judgment . . . is in conflict with a judgment . . ., the judges shall certify the record . . ." See further, *People* v. *Melone*, 73 Cal. 574, 577, where the code stated: "Whenever any person has received moneys . . ." and where the court held that "whenever" simply meant "if". For other cases see 68 C. J. 251.

[6]Highly misleading is the opening statement in the Summary of Argument (p. 4 of *amici* brief) that the Act "provides that any time after the end of one year a certification of a union may be challenged in election proceedings . . ." The Act does not so read or provide. The Act is silent as to when employees may revoke an agent's authority. All the Act says is that no election shall be directed where a valid election shall have been held in the preceding twelve-month period. Such a negative provision may not properly be converted into an affirmative condition, as the *amici* brief would have it, that one year (or any time, for that matter) must elapse before employees may "challenge" a certification by filing a petition "to decertify the union."

certification" election the exclusive manner of revoking an agent's authority, it would have included language to that effect.[7] For example, when Congress in § 10(a) empowered the Board to prevent unfair labor practices, it added that such power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." Again, when Congress in § 10(e) granted enforcement powers to the courts of appeals of the United States, it had no trouble in providing that, "The jurisdiction of the court shall be exclusive. . ."[8]

Revocation of bargaining authority without an election does not conflict with the remedy of an election. Nothing in the Act disables the employees from revoking an agency without going to the Board for an election. The employees can use the election procedure, if they wish, after one year. But they are not obliged by the statute to do so, either during or after one year. The authors of the 1947 amendments clearly did not intend to take away the pre-existing right of employees to create or to cancel the authority of a bargaining agent. To the contrary, the amendment to § 7 confirmed all employee rights, in their negative as well as

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[7]The term "decertification" does not appear in the Act. It is used, however, in the Board's regulations. (Sec. 101.17, Code of Federal Regulations, Title 29—Labor, Chapter II—National Labor Relations Board, Part 101—Statements of Procedure; and Sec. 102.53 (c), *Ibid.*, Part 102—Rules and Regulations, Series 6.)

[8]Instances could readily be multiplied in many other federal statutes. For example, § 105 (a) of the Renegotiation Act of 1951 (65 Stat. 12) provides that in the absence of the filing of a petition with the Tax Court, the Board's order "shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency." Sec. 108 of the same Act (65 Stat. 21) provides that, upon the filing of a petition for redetermination with the Tax Court, "such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits . . ."

positive aspect, by expressly adding that employees shall have the "right to refrain" from collective bargaining. If the majority of the employees find it practicable to sign a document of revocation and to deliver it to the agent and to the employer, and if this is done without any unfair labor practice in inducing it and prior to the signing of any contract with the employer, there appears no reason and no statutory prohibition against such method.[9]

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[9]The thesis of the *amici* that a certification must stand until revoked by a Board election would lead to anomalous results. Sec. 9(c)(1)(B) provides that, in cases of petitions for elections of all kinds, an election may be directed only if the Board first finds the existence of a "question of representation." Thus, if a union, certified perhaps four years previously, disclaimed interest and thereby caused the dismissal of a "decertification" petition—since there would be no "question of representation"—the same union, under the *amici* interpretation of the statute, could at any time thereafter require the employer to bargain collectively, inasmuch as it would still be the certified agent and would not have been "decertified" in a Board election. If the Board under such circumstances of disclaimer declared the old certification relinquished, the *amici*, to be consistent, would be compelled to argue that such action by the Board exceeded its statutory powers. Another anomaly would also be bound to arise under the *amici* theory of the law:—They find, so they say on p. 22 of their brief, nothing in their theory inconsistent with permitting an employer to refuse to honor a certification where the union has become defunct or a schism has occurred obscuring the union's identity. But, if the *amici* were correct in their theory (as expressed on p. 22 and *passim* in their brief)—that, until a decertification election is held, "the employer must continue to bargain with a certified union"—no such exceptions would be permissible because the statute would be inflexible and no exception would be contained therein.

POINT II.

The legislative history of the Act does not show that Congress intended an election to be the exclusive method for revoking the authority of a certified bargaining representative.

Although it is axiomatic that resort to legislative history is to be had only when the statute is ambiguous, let us nevertheless, and despite the clarity of the provisions under discussion, turn to the legislative history. We shall find that it does not say what the *amici* would like to have it say.

Their brief (pp. 8-9) makes much of the decision in 1930 in *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548. And they picture Senator Wagner as "repeatedly referring" to that case as establishing the doctrine that a representative status cannot be terminated except by an election. These things are just not so.

This Court, in the cited case, did not affirm on the basis stated at the top of page 9 of the *amici* brief. This Court accepted the concurrent findings of fact of the two courts below that the carrier had "interfered" with the right of the employees to designate the Brotherhood (Railway Labor Act of 1926, 44 Stat. 577, § 2, subd. Third); and then this Court passed on the question of law whether the statute imposed a legal duty upon the carrier not to "interfere", that is, an obligation enforceable by judicial proceedings. That was the whole case, and it had nothing to do with the issue now at bar.

The citations in the *amici* brief (p. 9, fn. 5) to certain statements by Senator Wagner are likewise not persuasive. Senator Wagner did not discuss at all the question of the

right of employees to withdraw the authority of a bargaining agent, or the question of the duration of a certification or of a representative status. All the Senator did was to cite the *Texas* case and mention the terms of the contempt decree of the District Court. Then he quoted from the Supreme Court's opinion as upholding the legality of collective action in designating representatives free from interference by the employer. And that was all.

The *amici* brief (pp. 16-17) also makes much of the dropping in conference of the provision in the 1947 House bill excepting from the twelve-month limitation an election upon a petition to withdraw bargaining authority. Such action, however, on the part of the conferees was not for the purpose of preventing a revocation under any and all circumstances but, as shown in petitioner's main brief (p. 10) and in the *amicus* reply brief of the Genesee Foundry Company, Inc. (pp. 9 and 12), was for the purpose of eliminating elections of all kinds in excess of one a year. This is readily understandable because of the possibility that under the House bill repeated petitions for "decertification" elections could have been filed during the year—a situation that might have led to an abuse akin to that which Congress was seeking to cure, namely, too frequent elections at the instance of the losing party. The contention of the *amici* that by omitting this House provision the Congress intended to prevent employees from ridding themselves of an unwanted agent for a year by any method whatever, is to prove too much; the same contention would also overlook and obliterate the amendment to § 7 of the Act recognizing the right of employees to refrain from collective bargaining.

This leaves only the remarks of Senator Taft, quoted by the *amici* (p. 17 of their brief). These remarks are wrenched from their context; when read in their setting they reveal no such meaning as the *amici* intend. Indeed, the meaning that the *amici* would read into Mr. Taft's statements is contrary to his whole philosophy. When read in context these remarks fall into their natural proportion and association in support of Mr. Taft's point that raids by rivals against an incumbent union, and oft-repeated elections at the instance of a losing but hopeful union, would be discouraged if elections were limited to not more than one a year. For ready reference we quote in the footnote the context of Senator Taft's remarks.[10]

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[10]Senator Taft was engaged in making a comprehensive statement on April 23, 1947, regarding the Senate bill (93 Cong. Rec. 3954). In the course of his statement he said:

"Mr. President, one of the matters which created the greatest complaint in the early days, and still does, is conduct of elections by the National Labor Relations Board. An election under present law may be sought only by a union. In the early days the Board exercised its discretion in favor of particular unions. It would not order an election until the union told it conditions were favorable, and it might win. Many of the greatest abuses on the part of unions occurred in the use of that discretionary power by the Board in the early days.

"Today an employer is faced with this situation. A man comes into his office and says, 'I represent your employees. Sign this agreement, or we strike tomorrow.' Such instances have occurred all over the United States. The employer has no way in which to determine whether this man really does represent his employees or does not. The bill gives him the right to go to the Board under those circumstances, and say, 'I want an election. I want to know who is the bargaining agent for my employees.' Certainly I do not think anyone can question the fairness of such a proposal.

"We provide, further, that there may be an election asked by the men to decertify a particular union. Today if a union is once certified, it is certified forever; there is no machinery by which there can be any decertification of that particular union. An election under this bill may be sought to decertify a union and go back to a nonunion status, if the men so desire.

"It is provided that where there is a ballot having three proposals on it, the AFL union, the CIO union, and no union at all, the two

POINT III.

Contrary to the claim of the *amici*, the courts have not construed § 9 (c) of the amended Act "as providing the sole method of questioning a certified union's continued status as bargaining representative."

The *amici* invoke *Labor Board* v. *Mexia Textile Mills*, 339 U. S. 563, as determinative of the present issue. We read that case quite differently.

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highest shall be certified in the run-off. Under existing conditions if, we will say, the AFL has the highest number but not a majority, the no-union has next, and the CIO union, third, the Board says that since the AFL and CIO together had a majority of the total, therefore the men want a union, and they do not put on the ballot the no-union proposal which was second in number of votes cast, they simply put the AFL and the CIO on it.

"This bill requires them to pursue the policy that has been pursued in every run-off election I know of—the two highest have to be certified in the run-off. The bill also provides that elections shall be held only once a year, so that there shall not be a constant stirring up of excitement by continual elections. The men choose a bargaining agent for 1 year. He remains the bargaining agent until the end of that year.

"The bill provides further that in these elections, and otherwise, there shall be equal treatment of independent unions. Today the Board refuses as a rule to certify an independent union. Most of the independent unions had some cloud on their original formation.

"Originally, perhaps they were a company union, or they had some aid from the company. The Board has taken the position that if those facts are once shown, they never will certify such a union, although it may have purged itself of that connection for the last 10 or 15 years. The telephone union was originally a company union. Now, nobody can question it is bona fide.

"If there be an AFL or CIO affiliate union which is company dominated, but which affiliates itself with the national AFL union, then the Board will permit it to purge itself promptly and will certify it as bargaining agent.

"This bill provides that it must give independent unions, under those circumstances, the same treatment that would be given a union affiliated with the AFL or the CIO. Numerous representatives of independent unions appeared before the committee who told us how unfairly they had been treated. It was felt that theirs was a good case."

In the first place, the issue now at bar was not presented, briefed, or argued in the *Mexia* case.

In the second place, the employees in *Mexia* had not revoked their agent's authority.

In the third place, this Court's opinion in *Mexia* evidenced a purpose to prevent an employer, guilty of unfair practices, from playing "hide-and-seek" by merely alleging a doubt as to the majority status of the union.

In the case at bar there was an affirmative and authentic revocation of the agent's authority, and there was no unfair labor practice by the employer.[11]

POINT IV.

If adopted, the theory of the *amici* would inevitably cause injustice both to employees and to employers. The amended Act requires no such interpretation.

It needs little demonstration to show the injustice to employees if they were to be utterly unable by any method for a year, or for any period, to revoke a certified bargaining agent's authority. Events and discoveries may occur within 24 hours after an election, making imperative in the eyes of the employees the termination of the agency. Where the majority of the employees so express themselves in authentic fashion, as in the case at bar, public policy would indicate that their desire be recognized. Otherwise, collective bargaining becomes not a shield but a sword. Assuming *arguendo* that a kind of stability might be

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[11]Little purpose would be served by analyzing in detail the cases from certain circuits, cited on pp. 19-20 of the *amici* brief. Suffice it to say that each of these cases on its facts is distinguishable from the case at bar, and that the excerpts therefrom, quoted by the *amici*, stem from *Mexia*.

achieved under a doctrine of enforced agency, it would not be a salutary stability. Larger considerations of freedom, albeit more fluid, emerge as the wise policy long-range.

The injustice of the *amici* thesis to employers is almost equally apparent. When an employer sits down to bargain, or when he encounters grievances from time to time in his plant, he is entitled to discuss matters with a man who truly represents the employees. The employer needs to be assured that any arrangement reached with the representative as to any of the myriad subjects of collective bargaining will be respected by and receive the support of the employees. It is easy to see how confusion and all sorts of labor disturbances would be the order of the day where, instead of intimate and amicable relations between the employees and their agent, there would exist friction and hostility. Moreover, an honest employer is entitled to an honest bargaining representative of his employees. An employer should not be forced to bargain with a man who possibly had been exposed as a Communist or a criminal or even a questionable individual whom the employees themselves had repudiated.

The ultimate issue does not revolve around considerations of "reasonable period" or the longevity of a "certification." The issue is a very high one.

Respectfully submitted,

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